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No. 720

In the Supreme Court of the United States

OCTOBER TERM, 1930

WALTER C. FETTERS, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF PENNSYLVANIA, PETITIONER

v.

UNITED STATES OF AMERICA EX REL. THOMAS W. CUNNINGHAM

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the District Court (R. 104) has not yet been reported. No hearing has been held before the Circuit Court of Appeals.

The opinion of the Circuit Court of Appeals in *United States ex rel. Cunningham* v. *Mathues* is reported in 33 F. (2d) 261; its opinion on rehearing may be found at pp. 51–52 of the record filed in this Court in the case of *Mathues* v. *United*

States ex rel. Cunningham, No. 451, October Term, 1930. The opinion of the District Court in that case is reported in 26 F. (2d) 272.

JURISDICTION

The judgment of the District Court was entered on December 23, 1930. (R. 107.) Appeal to the Circuit Court of Appeals for the Third Circuit was allowed on December 23, 1930. (R. 110.) The case has not been heard or submitted in the Circuit Court of Appeals. The petition for certiorari was filed in this Court on February 10, 1931. Certiorari was granted March 2, 1931. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an indictment under Section 102 of the Revised Statutes charging the respondent with having, as a witness before a Committee of the Senate, refused to answer questions pertinent to the question under inquiry by the Committee, was sufficient evidence of probable cause to sustain an order for his removal for trial in proceedings under Section 1014 of the Revised Statutes.

STATUTES INVOLVED

The statute upon which the indictment was founded is Section 102 of the Revised Statutes (U. S. C., Title 2, Sec. 192), which reads as follows:

> Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce

papers upon any matter under inquiry before either House, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100, and imprisonment in a common jail for not less than one month nor more than twelve months.

Section 1014 of the Revised Statutes (U. S. C., Title 18, Sec. 591) provides as follows:

For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness

is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

The duties of commissioners of circuit courts, referred to in this section, were transferred to United States Commissioners by the Act of May 28, 1896, c. 252, Sec. 19, 29 Stat. 184.

STATEMENT

On April 20, 1928, the respondent was indicted in the Supreme Court of the District of Columbia upon the charge of having refused to answer certain pertinent questions in a hearing being conducted by a Committee of the United States Senate. The indictment set forth in detail the Senate resolutions under which the Committee functioned and also set forth the questions which respondent refused to answer, alleging that they were pertinent to the inquiry being conducted by the Committee. (R. 9–28.) Later in 1928 the respondent was apprehended in Philadelphia under a warrant of arrest issued under Section 1014 of the Revised Statutes (*supra*, p. 3) by the United States District Judge sitting as a committing magistrate. (R. 40.) At the hearing the respondent's identity was admitted. (R. 42–43.) The Government introduced a certified copy of the indictment as evidence of probable cause, and then rested. (R. 43–63.)

The respondent challenged the sufficiency of the indictment, asserting in effect that it failed to show that the questions which the respondent refused to

answer were pertinent to the Committee's inquiry, notwithstanding the fact that the indictment alleged that they were pertinent. The respondent also introduced a transcript of his testimony before the Senate Committee. (R. 67–87.) The respondent was ordered committed, and the court issued a warrant directing his removal to the District of Columbia. (R. 35–36.)

He then filed a petition for a writ of *habeas corpus* in the United States District Court for the Eastern District of Pennsylvania, alleging, in substance, that the indictment failed to show that the questions which he refused to answer "were pertinent questions in the inquiry then being made by the particular Committee of the United States Senate." (R. 93–95.) After a hearing the court on May 10, 1928, entered an order dismissing the petition (R. 96), holding that the indictment was sufficient to support a warrant of removal (R. 87; *United States ex rel. Cunningham* v. *Mathues*, 26 F. (2d) 272).

The relator then appealed to the Circuit Court of Appeals for the Third Circuit. On May 17, 1929, that court, with one judge dissenting, reversed the order below on the ground that the indictment failed to charge a crime because the questions which the respondent refused to answer did not appear to be pertinent. *United States ex rel. Cunningham* v. *Mathues*, 33 F. (2d) 261. A petition for rehearing was filed, which was held under advisement by the court until May 26, 1930, when a

rehearing was allowed. On June 13, 1930, after the rehearing, the court entered an order adhering to its former decision, with an opinion which has not been reported.[1] Thereupon a petition for a writ of certiorari was filed in this Court on behalf of the United States Marshal. This Court, on October 27, 1930, granted a writ of certiorari, but ordered that the proceedings be dismissed as abated because the Marshal had gone out of office and no substitution had been made within the time provided by statute. *Mathues* v. *United States ex rel. Cunningham*, 282 U. S. iii.

After the abatement of the original *habeas corpus* proceedings in the District Court the respondent surrendered himself to the United States Marshal then in office. The respondent thereupon filed a new petition for a writ of *habeas corpus* which contained allegations similar to those made in the former petition. (R. 3–5.) A return to the writ was filed setting out as an exhibit the record in the former *habeas corpus* proceedings. (R. 32, 37–101.) Although the return was traversed, it was stipulated by counsel that the matter should be determined upon the petition and the return, including the former *habeas corpus* proceedings, made a part of the return. (R. 103.) After a hearing, the court ordered that the respondent be discharged (R. 107), stating in its opinion (R. 104–

[1] This opinion appears at pp. 51–52 of the record filed in this Court in the case of *Mathues* v. *United States ex rel. Cunningham*, No. 451, October Term, 1930.

106) that the law of the case had been determined by the opinion of the Circuit Court of Appeals in the former *habeas corpus* proceedings.

On December 23, 1930, an appeal to the Circuit Court of Appeals for the Third Circuit was allowed (R. 110), and on January 14, 1931, the case was docketed in the Circuit Court of Appeals. No further proceedings in that court were had. A petition for certiorari was filed in this Court on February 10, 1931, and certiorari was granted on March 2, 1931.

SPECIFICATION OF ERRORS

The District Court erred—

1. In directing that the respondent be discharged.

2. In holding that the indictment failed to charge an offense.

3. In holding that the indictment was not evidence of probable cause sufficient to sustain the commitment of the respondent for removal under Section 1014 of the Revised Statutes.

SUMMARY OF ARGUMENT

This Court has frequently held that in removal proceedings or in *habeas corpus* proceedings to test the validity of an order of removal the sufficiency of an indictment which is not palpably invalid is a question to be determined solely by the trial court. If there is any defect in the indictment in the instant case it is not patent. Under the de-

cisions of this Court it is clear that the question of the validity of the indictment should be left to the trial court.

Even if the pertinency of the questions which the respondent refused to answer was a matter for determination by the court in removal proceedings, we submit that the questions were pertinent. The questions were designed to test the accuracy of his testimony before the committee and to discover the source of the funds which he contributed. In *Barry* v. *United States, ex rel. Cunningham*, 279 U. S. 597, 619, this Court had occasion to consider the same questions, and said that "it is impossible for us to say that the information sought and refused would not reflect light upon the validity of Vare's election."

ARGUMENT

The indictment in the instant case is founded on Section 102 of the Revised Statutes (*supra*, p. 2), which makes it an offense for any person summoned as a witness before a committee of Congress willfully to refuse "to answer any question pertinent to the question under inquiry." The indictment sets forth the questions which the respondent refused to answer at a hearing conducted by a special Senate Committe investigating certain corrupt practices, and specifically charges that the questions were pertinent to the inquiry being made by the Committee. (R. 9–28.)

The Circuit Court of Appeals regarded the pertinency of the questions as a matter for it to decide in its determination of the question whether the indictment constituted probable cause for removal, and it held that the questions were not pertinent. In so doing, we submit that the court below failed to observe the narrow limits of power which may be exercised either in removal proceedings or on *habeas corpus* to test the validity of an order of removal.

I

THE PERTINENCY OF THE QUESTIONS WAS NOT PROPERLY A MATTER FOR DECISION IN THE REMOVAL PROCEEDINGS

The pertinency to the question under inquiry of the questions put to the respondent which he refused to answer was affirmatively alleged in the indictment. This issue tendered by the indictment could only be determined on the trial upon proofs disclosing the scope of the Committee's inquiry, the evidence adduced before it, and the bearing of the testimony sought to be elicited upon the investigation being pursued by the Committee. In such an investigation materiality must always depend upon the development and course of the investigation itself, unless it appear from an examination of the questions alleged to be irrelevant that they are so far removed from any possible relevancy to the inquiry authorized that no development in the course of such an investigation could conceivably render answers to such questions perti-

nent. Here the indictment alleged the resolutions under which the investigation was being conducted (R. 10–14), and it appeared that the questions put to the respondent were clearly within the general scope of the investigation authorized. Since the indictment itself alleged that the questions were pertinent to questions and matters under inquiry by the Committee no determination that the questions were not pertinent could be made except upon the proofs offered at the trial. The court below, however, in the face of allegations to the contrary, held as a matter of law that the questions were not pertinent to any question under inquiry before the Committee. We submit that not even the court in the trial District could make such a determination in advance of trial. But we contend that, even if the indictment had been open to attack on demurrer for failure to allege the pertinency of the questions which the respondent refused to answer, this would be a question which could only be determined under the decisions of this Court by the court in the trial district.

This Court has frequently held that in removal proceedings or in *habeas corpus* proceedings to test the validity of an order of removal the sufficiency of an indictment which is not palpably invalid is a question to be determined by the trial court. It is, of course, conceded that a document which purports to be an indictment may so plainly fail to charge any offense against the United States that it does not furnish a proper

basis for an order of removal. Thus, to put an extreme example, if an indictment charged a defendant with the offense of having red hair, the indictment would be palpably invalid, and, of course, would not constitute the probable cause necessary to support a warrant of removal. But if there is any defect in the indictment in the instant case, it is certainly not patent.

The case of *Henry* v. *Henkel*, 235 U. S. 219, is, we submit, controlling. In that case the defendant refused to answer certain questions put to him by a committee of Congress, and on account of his refusal he was indicted in the District of Columbia under Section 102 of the Revised Statutes. The defendant was arrested in New York and resisted removal. The Commissioner ordered the defendant to be held in custody, and the defendant thereupon applied to the District Judge for a writ of *habeas corpus*, contending (p. 226) that the resolution defining the scope of the inquiry "did not authorize an inquiry as to the matter about which [he] refused to testify." The District Judge discharged the writ, and on appeal this Court affirmed the judgment, holding that the questions raised were for the sole consideration of the court in the trial district.

In *Rodman* v. *Pothier*, 264 U. S. 399, a defendant resisted removal on account of an alleged lack of jurisdiction of the trial court over the place where the offense was committed. This Court held that

an order for removal was properly issued, saying (p. 402):

> Whether the *locus* of the alleged crime was within the exclusive jurisdiction of the United States demands consideration of many facts and seriously controverted questions of law. As heretofore often pointed out, these matters must be determined by the court where the indictment was found. The regular course may not be anticipated by alleging want of jurisdiction and demanding a ruling thereon in a *habeas corpus* proceeding.

That the duty of the committing magistrate does not extend to the determination of the validity of the indictment, except in extreme cases, and that the power of the court in *habeas corpus* is no greater, is plainly indicated by the decision in *United States ex rel. Hughes* v. *Gault*, 271 U. S. 142. There this Court pointed out that under Section 1014 of the Revised Statutes power to commit for removal (p. 150) "is entrusted not only to judges and commissioners of the United States, and judges of state courts, but to any 'mayor of a city, justice of the peace, or other magistrate, of any State where he may be found.'" This Court said (p. 150):

> Obviously, in order to make it the duty of the judge to issue the warrant a mayor or a magistrate not a lawyer can not be expected to do more than to decide in a summary way that the indictment is intended

> to charge an offense against the laws of the United States, that the person before him is the person charged and that there is probable cause to believe him guilty, without the magistrate's being held to more than avoiding palpable injustice. * * * The rule that would apply to a mayor applies to a commissioner of the United States.

Numerous other decisions apply the controlling principles which this Court has enunciated in confining proceedings under Section 1014 of the Revised Statutes (*supra*, p. 3) to the mere consideration of probable cause, excluding from the consideration of the committing magistrate, with rare exceptions, all questions regarding the sufficiency of the indictment or jurisdiction of the trial court. *Horner* v. *United States*, 143 U. S. 570, 577; *Benson* v. *Henkel*, 198 U. S. 1; *Hyde* v. *Shine*, 199 U. S. 62; *Rumely* v. *McCarthy*, 250 U. S. 283; *Gayon* v. *McCarthy*, 252 U. S. 171; *Morse* v. *United States*, 267 U. S. 80.[2]

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[2] In *Parker* v. *United States*, 3 F. (2d) 903, 904 (C. C. A. 9th), certiorari denied, 268 U. S. 694, the rule was stated in the following language:

"If the indictment were clearly defective, we would not hesitate to discharge the appellant; but no such case is presented here. Without going into the objections in detail, the most that can be said is that they present debatable questions, and it is well settled that all disputed questions of fact and all disputed matters of law, relating either to the sufficiency of the indictment or to the validity of the statute on which the indictment is based, are for the determination of the court in which the indictment was returned."

The question of pertinency under Section 102 of the Revised Statutes has been likened to the question of materiality of false testimony charged as perjury. *Sinclair* v. *United States*, 279 U. S. 263, 298. Such questions are peculiarly for the consideration and determination of the trial court.

II

THE QUESTIONS WHICH THE RESPONDENT REFUSED TO ANSWER WERE PERTINENT

Even if the pertinency of the questions which the respondent refused to answer was a matter for determination by the court in removal proceedings, we submit that it clearly appears that the questions were pertinent. For the convenience of the Court, the questions upon which the indictment is based are set forth in the Appendix (*infra*, pp. 17–21). The general scope of the Committee's investigation is defined in the Senate Resolutions which are set forth in the indictment. (R. 10–14.)

The respondent introduced in the removal proceedings a transcript of his testimony before the Senate Committee. (R. 67–87.) Of this very testimony this Court in *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597, 609, said:

> The questions here presented for determination grow out of an inquiry instituted by the United States Senate in respect of the validity of the election of a United States

Senator from Pennsylvania in November, immediately after the conclusion of the primaries, by the adoption of a resolution appointing a special committee to investigate expenditures, promises, etc., made to influence the nomination of any person as a candidate or promote the election of any person as a member of the Senate at the general election to be held in November, 1926.

After the Pennsylvania primaries Cunningham was subpœnaed and appeared before this committee. Among other things, he testified that he was a member of an organization which supported William S. Vare for Senator at the primary election; that he had given to the chairman of the organization $50,000 in two instalments of $25,000 each prior to the holding of the primaries. He had been clerk of a court for 21 years and was then receiving a salary of $8,000 a year. He paid the money to the chairman in cash, but refused to say where he obtained it except that he had not drawn it from a bank. He would not say how long the money had been in his possession; said he had never inherited any, but declined to answer whether he had made money in speculation. In short, he declined to give any information in respect of the sources of the money, insisting that it was his own and the question where he had obtained it was a personal matter. He further said that he had learned the trick from a former sena-

tor of "saving money and putting it away and keeping it under cover"; that this senator "was a past master in not letting his right hand know what his left hand done, and he dealt absolutely in cash. The 'long green' was the issue."

The questions which were put to Cunningham, and which he declined to answer, were designed to test the veracity of his testimony and to discover whether or not the funds he contributed were furnished by other persons. (R. 16–17, 19, 21, 23, 25, 27.) The Circuit Court of Appeals, both in *United States ex rel. Cunningham* v. *Mathues*, 33 F. (2d) 261, 263, and in the *Barry case* (29 F. (2d) 817, 821), held that the questions were not pertinent to the question under inquiry by the Committee, and directed the respondent's discharge from custody in both cases. Apparently that court failed to appreciate the necessity of testing the respondent's veracity. He had been clerk of a State court for twenty-one years, and at the time of his examination was receiving a salary of only $8,000 per year, and yet he testified that he contributed $50,000 in cash toward the expenses of a Senatorial campaign. (R. 68–73.) This story called for a most searching examination as to the source of this money, for the purpose of enabling the Committee to determine whether he was telling the truth or was acting for others in making the contribution.

In the *Barry case, supra,* it was not necessary for this Court to determine the pertinency of the questions which the respondent refused to answer; but in commenting on his testimony this Court said in that case (p. 619):

> Upon examination by the committee, he repeatedly refused to answer questions which the committee deemed relevant and of great importance, not upon the ground that the answers would tend to incriminate him, but that they involved personal matters. These questions have already been recited, and it is impossible for us to say that the information sought and refused would not reflect light upon the validity of Vare's election.

Consequently we believe that the court below erred in holding that the questions were not pertinent if that question was before it for decision.

The indictment in the instant case was returned in the District of Columbia on April 20, 1928. Nearly three years have been consumed in an effort to remove the respondent to the District of Columbia for trial. We believe that the record shows that resistance to removal has been unreasonably protracted, and that if the decision of this case is in favor of the petitioner, the mandate should issue forthwith. Such action was taken by this Court in the similar case of *Salinger* v. *Loisel,* 265 U. S. 224, 238.

CONCLUSION

We submit that the decision below was erroneous, and that the judgment of the District Court should be reversed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

CLAUDE R. BRANCH,
Special Assistant to the Attorney General.

ERWIN N. GRISWOLD,
Attorney.

MARCH, 1931.

APPENDIX.

QUESTIONS WHICH THE RESPONDENT REFUSED TO ANSWER, AS SET FORTH IN THE INDICTMENT

First Count (R. 16, 17):

The CHAIRMAN. Mr. Cunningham, the committee has called you before it the second time in order to permit you an opportunity to answer the questions you declined to answer before, and afford you the opportunity to answer such other questions as may be put to you. Mr. Cunningham, on your previous examination you stated (reading):

"I handed money to Thomas F. Watson—$25,000 on the 10th day of April, 1926."

Then this follows, as shown by the record of the proceedings (reading):

"The CHAIRMAN. Where did you get that money?

"Mr. CUNNINGHAM. I got that money out of my own private funds.

"The CHAIRMAN. How is that?

"Mr. CUNNINGHAM. Out of my own private funds.

"The CHAIRMAN. Your own private moneys?

"Mr. CUNNINGHAM. Yes, sir; my own money; my own money.

"The CHAIRMAN. How long had it been your own money?"

Mr. Golder at that time stated an objection, which appears in the record.

The question was repeated as follows (reading):

"The CHAIRMAN. How long had it been your own money?

"Mr. CUNNINGHAM. I refuse to answer that question, Senator, as a personal question. It is my own private business."

Second Count (R. 19):

The CHAIRMAN. Where did you get this $25,000 you say you gave Mr. Watson?

Mr. CUNNINGHAM. I refuse to answer that question, I think that is personal.

Third Count (R. 21):

The CHAIRMAN. Where were you keeping the $25,000 before you gave it to Mr. Watson?

Mr. CUNNINGHAM. That is another personal question, Senator. I refuse to answer it.

Fourth Count (R. 23):

The CHAIRMAN. Did you give this money to Mr. Watson in cash or by check?

Mr. CUNNINGHAM. I gave it to him as cash.

The CHAIRMAN. Where were you when you gave it to him?

Mr. CUNNINGHAM. I took it down to his headquarters at the Walton Hotel on the 10th day of April.

The CHAIRMAN. Did you have it in your pocket when you gave it to him—before you gave it to him?

Mr. CUNNINGHAM. Yes, sir.

The CHAIRMAN. Where did you get it from to put in your pocket?

Mr. CUNNINGHAM. That is a personal question, and I decline to answer it.

Fifth Count (R. 25):

The CHAIRMAN. Mr. Cunningham, how long had you had this money in your possession?

Mr. CUNNINGHAM. That is another personal question, and I decline to answer it. It was my own money, and I do not think I should tell the public where I kept it and how I got it, or anything else about it.

Sixth Count (R. 27):

The CHAIRMAN. Was this money which you refer to as the $25,000 that you gave to Watson, savings from your salary?

Mr. CUNNINGHAM. That is another personal question. I can not answer that.

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